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In The

Supreme Court of the United States

October Term, 1989

SWANCO INSURANCE COMPANY-ARIZONA,

Petitioner,

v.

WILLIAM D. HAGER
Commissioner of Insurance of the State of Iowa,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION

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STATEMENT OF THE CASE

The Commissioner has no disagreement with the scope or accuracy of Swanco's statement of the case except in the following regard.

The assertion that purchasing groups are "legal entities", Petition for Writ of Certiorari at 7, is not necessarily correct. Frequently, purchasing groups are not incorporated. Pet. App. at 13b. Even though apparently allowed under the federal Liability Risk Retention Act, (15 U.S.C. §§ 3901-06) [hereafter, the "Act"], an unincorporated purchasing group would not be treated as a corporate entity for diversity purposes. *See generally United Steelworkers of America v. R. H. Bouligny*, 382 U.S. 145 (1965) (unincorporated association a "citizen" wherever it has members). Its status as a "legal entity" is thus questionable.

REASONS FOR DENIAL OF THE PETITION

1. Given That The State Law Issue Was Separate And Distinct From The Federal Statutory Issue And Could Not Have Formed a Basis For The Decision By The Eighth Circuit Because Of The Eleventh Amendment To The United States Constitution In Any Event, The Eighth Circuit Properly Refused To Consider It.

The only question before the lower courts was "whether, *consistent with the [federal] Act*, the State of Iowa may require an insurance company providing coverage to a purchasing group domiciled in another state but having members in Iowa to be licensed in Iowa". (Emphasis added). Pet. App. at 2a. The legal authority of Iowa to

require licensure of Swanco is entirely separate from the question of whether it does in fact. Thus the principle that a change in law during an appeal will govern the result is inapplicable because the change in law does not affect the issue in the case. Rather, the Eighth Circuit properly applied the well established principle that consideration will ordinarily not be given to issues raised for the first time on appeal. *See Hormel v. Helvering*, 312 U.S. 552, 556 (1941).

The issue posed by § 515E.9 (Pet. App. E) is not even relevant to the meaning of the Act. Section 515E.9 is a product not of Congress but of the Iowa legislature. It is based upon a model Act promulgated by the National Association of Insurance Commissioners (Res. App. at 1a). It is not an enactment of Congress. The Iowa legislature has less the status of an administering federal agency, such as the United States Department of Commerce, for purposes of deference to statutory construction.[1]

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[1] The position taken by the Commissioner in the Eighth Circuit was that § 515E.9(4) is referring only to regular admission, as opposed to surplus lines, and thus is not inconsistent with the state imposing at least a surplus lines requirement on a purchasing group insurer. Under this interpretation, if the insurer does not utilize the option of regular admission but instead opts for surplus lines licensure, it must disclose to its policyholders the fact that there is no guaranty coverage. In the jargon of insurance regulators, "admission", or "admitted", frequently refer only to regularly admitted companies; indeed, under Iowa law, surplus lines insurers are referred to as "unauthorized", Iowa Code § 515.147 (1989). Based as it is on a model statute by the National Association of Insurance Commissioners, § 515E.9(4) could hardly have been intended to be given a preclusive effect toward non-domiciliary licensing.

Further, the lower federal court simply could not have based its decision on the § 515E.9 issue. Under the Eleventh Amendment to the United States Constitution, a federal court cannot grant even affirmative (including declaratory) relief against a state official based on a violation of *state* law. *See Pennhurst State School and Hosp. v. Halderman*, 465 U.S. 89, 106 (1984); *Central Reserve Life of North America Ins. Co. v. Struve*, 852 F.2d 1158, 1161 (9th Cir. 1988). The lower court was jurisdictionally precluded from entertaining the § 515E.9 issue and basing any relief thereon.

2. The Eighth Circuit Correctly Found That The Federal Act Does Not Preempt Non-domiciliary Licensing Of A Purchasing Group Insurer.

One must begin, as the Eighth Circuit recognized, with the "well established presumption against imputing to Congress an intention to preempt an area that traditionally has been left to state regulation [such as insurance by virtue of the McCarran Act]". Pet. App. at 8a, *citing Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977); *see also Metropolitan Life Ins. Co. v. Mass.*, 471 U.S. 724 (1985).

Nothing in the language of the Act preempts the requirement of licensure by non-domiciliary states of a purchasing group's insurer.

The Act eschews a comprehensive federal regulatory scheme. *See Home Warranty Corp. v. Caldwell*, 777 F.2d 1455, 1471-72 (11th Cir. 1985), *cert. denied*, 479 U.S. 852 (1986). Instead, it creates two different alternatives to conventional insurance: risk retention groups, which are self-insurance pools, and purchasing groups, which are

vehicles for the group purchase of property/casualty insurance, an option frequently not available under state law in the absence of the federal Act. Only as to risk retention groups is licensing limited to a single state. 15 U.S.C. § 3902(a)(1).

The preemption schemes for the two alternative insurance mechanisms are entirely different, as the Second Circuit Court of Appeals found in *Insurance Co. of State of Pennsylvania v. Corcoran*, 850 F.2d 88, 91 (2nd Cir. 1988) (non-domiciliary state could subject purchasing group's insurer's rates and forms to its review and approval). The result is a profoundly different treatment of state laws affecting risk retention and purchasing groups:

> [I]n light of § 4(a)'s [15 U.S.C. § 3903(a)] express preemption of specific state laws, application of the principle of *expressio unius est exclusio alterius* leads directly to the conclusion that *state regulation not expressly mentioned in § 4(a) remains in force.*

Id. (emphasis added); *see also* H.R. Rep. No. 865, 99th Cong., 2d Sess. at 19 *reprinted in* U.S. Code Cong. & Admin. News 5303, 5316; 15 U.S.C. § 3903(g). Since § 3903(a) does not include it in its list of proscriptions, state licensing of a purchasing group insurer is permissible.

Compliance with a non-domiciliary licensure requirement is not a physical impossibility. As construed by the Eighth Circuit, the Act requires licensing in one state;

other states may also require licensure but it is not physically impossible to obtain more than one license.[2]

A non-domiciliary licensing requirement does not stand as an obstacle to the execution of the Act. Swanco overstates the importance of the goal of the Act of increased availability of insurance coverage. The Eighth Circuit properly read the Act as Congress disavowing availability as its *only* purpose. This is particularly so as to purchasing groups. A considerable degree of regulatory leeway remains in the states and a balance between availability and regulation was struck.

The regulatory significance of state-by-state licensing is that it triggers the release of financial information to non-domiciliary states and allows them to police the financial condition of an insurer selling within their borders. Without licensing, the insurance-buying public and regulators of those states cannot readily determine the financial condition of an insurer selling insurance within their borders. Nor can it always be assumed that the domiciliary state possesses the willingness to protect the

---

[2] Section 3903(f) is simply not the exclusive provision relating to licensing. While Respondent prefers the interpretation of that section adopted by the district court – the "location" issue – the Eighth Circuit is correct that its § 3903(f) analysis does not end the inquiry. Section 3903(f) merely creates a minimum one-state licensing requirement. This leaves non-domiciliary states free to enforce their licensing laws and regulations to the extent they are consistent with § 3903(a)'s restrictions, such as prohibiting discrimination by a state against a group or its insurer.

residents of other states. (The insurer may have very little or no premium volume in the domiciliary state.) Contrary to Swanco's assertion, Congress did not intend to frustrate the states' regulatory powers in this regard by opting for the one-state-of-regulation approach it took for risk retention groups.

> "Congress selected particularized means to [the end of increasing the availability of liability insurance] in conscious recognition that a considerable degree of state regulation would remain."

Corcoran, 850 F.2d at 92-93.

Congressional debate indicates that adequacy of regulatory safeguards was of concern to the enacting body:

> "[A] number of witnesses at the hearing on this legislation raised concerns regarding the scope of the legislation and the need to assure that insurance regulators in *nonchartering states* have sufficient authority with respect to fraudulent practices by risk retention groups and *purchasing groups*, improper sales to the general public by such groups, and the financial condition of such groups." 132 Cong. Rec. S 9229 (1986) (Remarks of Sen. Kasten).

The alarming increase in insurer insolvencies in recent years was brought to the attention of Congress. 132 Cong. Rec. S 9241 (1986). Interestingly, a significant number of the purchasing group insurers listed in Appendix F to the petition are either unlisted or not assigned a rating by *Best's Insurance Reports (Property-Casualty ed.)* (1989), the authoritative publication on insurer financial condition.

Any burden to insurers created by licensure is overshadowed by paramount regulatory concerns. As this

Court has recognized, the insurance business has long been subject to intense regulation. *See generally Robertson v. California*, 328 U.S. 440, 456 (1946). The burden of licensing is lessened somewhat by the ease of meeting surplus lines requirements. Pet. App. at 5a n.4. Moreover, as the Eighth Circuit noted,

> "Allowing nondomiciliary states to enforce their licensing and regulatory laws not preempted by § 4(a) burdens an insurer of a purchasing group no more than any other insurer desiring to market its policies in several states." (Pet. App. at 13a n.10).

3. There Is No Split In The Circuits.

Indeed, one lower federal court has followed the Eighth Circuit's decision upholding non-domiciliary licensing. *See Florida v. Nat'l Amusement Purchasing Group, Inc.*, No. TCA-40215-WS (N.D. Fla. Oct 5, 1989). (Res. App. at A-2).

4. Swanco's Forum For Its Complaints About The Burden of Non-domiciliary Licensing Requirements Is Congress, Not The Judiciary.

Congress has resolved the competing policy considerations behind the federal statutory issue. If Swanco is unhappy with that resolution it must address its concerns to Congress.

Policy issues are very much in dispute. Respondent questions whether purchasing groups are indeed the spontaneous product of the need of a defined group, such as a trade or business organization, for hard-to-obtain

liability insurance coverage or, rather, whether many are merely marketing devices which are the creation of insurers not licensed in many states who wish to utilize Swanco's construction of the Act to avoid it. The lack of any chartering requirement for purchasing groups permits marketers to use the Act in a manner unintended by Congress. The states should remain free to devise appropriate regulation of purchasing group insurers.

CONCLUSION

The Court should deny the petition for a writ of certiorari. None of the criteria in Sup. Ct. R. 17 have been met. The Eighth Circuit's decision is not in conflict with applicable decisions of this Court. It is not in conflict with those of another Circuit. Nor is there any reason why this Court, rather than Congress, should address the policy concerns raised by the Petition.

Respectfully Submitted,

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Section 9. Restrictions on Insurance Purchased by Purchasing Groups

A. A purchasing group may not purchase insurance from a risk retention group that is not chartered in a state or from an insurer not admitted in the state in which the purchasing group is located, unless the purchase is effected through a licensed agent or broker acting pursuant to the surplus lines laws and regulations of such state.

B. A purchasing group which obtains liability from an insurer not admitted in this state or a risk retention group shall inform each of the members of such group which have a risk resident or located in this state that such risk is not protected by an insurance insolvency guaranty fund in this state, and that such risk retention group or such insurer may not be subject to all insurance laws and regulations of this state.

C. No purchasing group may purchase insurance providing for a deductible or self-insured retention applicable to the group as a whole; however, coverage may provide for a deductible or self-insured retention applicable to individual members.

D. Purchases of insurance by purchasing groups are subject to the same standards regarding aggregate limits which are applicable to all purchases of group insurance.

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

STATE OF FLORIDA,
DEPARTMENT
OF INSURANCE,

Plaintiff,

v. TCA 87-40215-WS

NATIONAL AMUSEMENT PURCHASING GROUP, INC.; RISK RETENTION SERVICE CORPORATION; BEL-AIRE INSURANCE COMPANY; Missouri corporations,

ORDER

Defendants.

On October 14, 1987, the court conducted a hearing upon plaintiff's motion for a preliminary injunction. *See* document 4. By agreement of the parties, trial of the action was advanced and consolidated with the preliminary injunction hearing as authorized by Federal Rule of Civil Procedure 65(a)(2). The court stated at the conclusion of the hearing that there was no need for a preliminary injunction because the matter was ready to take under advisement for final decision. That decision, long overdue, is now embodied in this order.

This case turns upon the court's construction of the Product Liability Risk Retention Act of 1981 (the "Act"), as amended by the Liability Risk Retention Act of 1986, 15 U.S.C. §§ 3901-3906 (1982 & Supp. V 1987). Such Act authorizes persons and businesses with similar or related liability exposure to purchase liability insurance on a group basis through purchasing groups or to self-insure

through insurance cooperatives called risk retention groups. 15 U.S.C. § 3901(a)(4), (5). Aimed at reducing the cost and increasing the availability of commercial liability insurance, the Act expressly preempts state laws which make purchasing and risk retention groups illegal.

One of the defendants in this case, National Amusement Purchasing Group, Inc. ("National Amusment"), is a purchasing group formed pursuant to section 2(a)(5) of the Act. A purchasing group is defined under the Act as any group which

> (A) has as one of its purposes the purchase of liability insurance on a group basis;
>
> (B) purchases such insurance only for its group members and only to cover their similar or related liability exposure, as described in subparagraph (C);
>
> (C) is composed of members whose businesses or activities are similar or related with respect to the liability to which members are exposed by virtue of any related, similar, or common business, trade, product, services, premises, or operations; and
>
> (D) is domiciled in any State.

15 U.S.C. §3901(a)(5). A Missouri corporation whose members include several Florida businesses, National Amusement purchased insurance coverage for its members from defendant Bel-Aire Insurance Company, a Missouri insurer authorized by the Missouri Division of Insurance to sell insurance in Missouri. Defendant Risk Retention Service Corporation (RRSC) is also a Missouri corporation, allegedly formed to service risk purchasing groups such as National Amusement.

On April 10, 1987, through RRSC, National Amusement sent notice to plaintiff in this case, the State of Florida, Department of Insurance (the "department"), that it planned to offer liability coverage to businesses located in Florida, through policies issued by Bel-Aire. Plaintiff responded by filing suit on August 27, 1987, seeking declaratory and injunctive relief from defendants' alleged violations of the insurance laws of Florida. Plaintiff contends that, pursuant to section 627.949 of the Florida Statutes, a purchasing group may purchase insurance or coverage on a risk located in Florida only from: (1) a risk retention group that is certificated or licensed in one of the states of the United States; (2) an authorized insurer; or (3) an eligible surplus lines insurer. Because Bel-Aire is none of the three, plaintiff argues that all three defendants are, or have been, transacting the business of insurance in Florida in noncompliance with applicable provisions of the Florida Insurance Code. Defendants argue in response that the federal Liability Risk Retention Act preempts the state laws cited by plaintiff, thus exempting defendants from any Florida law that would otherwise prevent the activities at issue here.

DISCUSSION

Under Florida law, with limited exceptions, persons who transact the business of insurance in Florida must have a certificate of authority issued by the Department of Insurance. § 624.401(1). Any unauthorized insurer transacting the business of insurance in Florida is subject to liability for a civil penalty of not more than $1,000 for each nonwillful violation or not more than $10,000 for each willful violation. § 626.910. In addition, any person

who represents or aids an unauthorized insurer may be subjected to criminal liability. § 626.902(1). The most notable exception to the certificate of authority requirement is that permitting the lawful transaction of surplus lines insurance, defined as insurance not procurable from an authorized insurer. § 624.402. Although the surplus lines insurer need not have a certificate of authority, he must be approved by the department, and the insurance written must be placed only by or through a licensed Florida surplus lines agent. § 626.915. Importantly, each surplus lines policy must carry a warning that the insurer is not licensed by the State of Florida and that the protection provided by the Florida Insurance Guaranty Act does not apply. § 626.924.

The Liability Risk Retention Act has created another category of insurer which may legally transact insurance business within Florida – the risk retention group. *See* Fla. Stat. § 624.11(2) (risk retention groups, organized under the provisions of the Act and properly licensed and authorized in an appropriate jurisdiction, may transact insurance in Florida, subject to selected provisions of the Florida Insurance Code). Under the Act, persons or businesses with similar types of risk may form and own their own insurance company to insure against their liability exposures. 15 U.S.C. § 3901(4). Chartered in the group's state of domicile, the risk retention group is regulated primarily by the domiciliary state. The authority of non-domiciliary states to license and regulate risk retention groups is largely preempted. In sweeping preemption language, the Act provides in section 3(a)(1) that "a risk

retention group is exempt from any State law, rule, regulation, or order to the extent that such law, rule, regulation, or order would . . . make unlawful, or regulate, directly or indirectly, the operation of a risk retention group except that the jurisdiction in which it is chartered may regulate the formation and operation of such a group." 15 U.S.C. § 3902(a)(1). Specific exceptions to this broad preemption are enumerated in subsequent subsections. *See* 15 U.S.C. §3902(a)(1)(A)-(I). Notably, non-domiciliary states are permitted to: (1) tax business written by a risk retention group in such state; (2) require compliance with the state's unfair claims and deceptive trade practices laws; (3) require notice on policies issued by a risk retention group that the non-domiciliary state's insurance laws do not apply and state insurance insolvency guaranty funds are not available; and (4) subject the group, under some circumstances, to an examination by the state insurance commissioner as to the group's financial condition. In sum, with respect to risk retention groups, Congress carefully crafted a scheme which, on the one hand, provides for broad preemption of a non-domiciliary state's licensing and regulatory laws but which, on the other hand, explicitly preserves for those states several very important powers.

In addition to risk retention groups, the Act recognizes a separate alternative to traditional insurance – purchasing groups. For these groups, section 4 of the Act provides a separate and very different preemption scheme. Unlike the risk retention section which broadly preempts state law while enumerating specific laws that states may enforce, the section pertaining to purchasing groups expressly preempts a limited number of specific

state laws while also providing that "[n]othing in this chapter shall be construed to affect the authority of any State to make use of any of its powers to enforce the laws of such State with respect to which a purchasing group is not exempt under this chapter." 15 U.S.C. § 3903(g). As noted in the House Report on the 1986 amendments to the Act:

> In enacting the 1981 Act, it was recognized that there were a number of identifiable kinds of State laws that prevented the establishment and functioning of purchasing groups. Those laws were listed in Section 4(a) of the 1981 Act and it is those laws that are preempted. Subject to the prohibition on discrimination against purchasing groups, the states remained able to apply all their other laws to purchasing groups and those dealing with such groups. This approach is carried forward into the 1986 Act. Therefore the Committee did not consider it necessary to itemize all the other laws to which purchasing groups remain subject.

H.R.Rep. No. 865, 99th Cong., 2d Sess. 19, *reprinted in* 1986 U.S.Code Cong. & Admin. News 5316. In other words, both the language and the history of the Act suggest that Congress intended there to be limited preemption of state laws relative to purchasing groups.

Notwithstanding such suggestion, defendants in this case argue that section 4 of the Act was intended to effect a complete preemption of state licensing laws, including those prohibitions against the unauthorized transaction of insurance business. In essence, defendants would have this court recognize a fourth category of insurer which may lawfully transact insurance in Florida, an insurer which is neither licensed in the state, nor approved as a

surplus lines insurer in the state, nor registered as a risk retention group in the state.

In support of their argument, defendants first point to sections 4(a)(2) and (3) of the Act. Section 4(a) preempts:

> any State law, rule, regulation, or order to the extent that such law, rule, regulation, or order would –
>
> . . .
>
> (2) make it unlawful for an insurer to provide or offer to provide insurance on a basis providing, to a purchasing group or its members, advantages, based on their loss and expense experience, not afforded to other persons with respect to rates, policy forms, coverages, or other matters;
>
> (3) prohibit a purchasing group or its members from purchasing insurance on the group basis described in paragraph (2) of this subsection.

15 U.S.C. § 3903(a)(2), (3). Defendants contend that the Florida statute relied upon by the department in this case, if enforced, would make it unlawful for Bel-Aire to provide, and National Amusement to purchase, insurance which affords advantages based on the group's loss and expense experience. Thus, defendants conclude that the plain terms of the statute exempt Bel-Aire and National Amusement from the state licensing laws. Further, defendants say that section 4(f) of the Act confirms that the state law at issue here is preempted. That section provides that "[a] purchasing group may not purchase insurance from a risk retention group that is not chartered in a State or from an insurer not admitted in the State in which the purchasing group is located." 15 U.S.C.

§ 3903(f). Assuming that the Act uses the word "located" to refer to the purchasing group's domiciliary state, defendants reason that because section 4(f) states that a purchasing group may not purchase from an insurer not admitted to the state in which the purchasing group is located, the insurer need *only* be admitted to that state and need not be admitted or otherwise qualified elsewhere. Indeed, defendants suggest that section 4(f) would be superfluous if it were given any other construction.

The court is unable to agree with defendants' construction of the Act. Although convinced that defendants correctly analyze the meaning of the term "located" in Section 4(f), *see Swanco Insurance Co. – Arizona v. Hager*, 879 F.2d 353 (8th Cir. 1989)(section 4(f) refers to the single state in which the purchasing group is domiciled), the court rejects the argument that the Act exempts insurers of purchasing groups from the licensing and regulatory laws of nondomiciliary states. Neither section 4(f) nor sections 4(a)(2) and (3) can be read so broadly. Section 4(a)(2) expressly preempts only those state laws that prohibit insurers from offering purchasing groups "advantages, based on their loss and expense experience." 15 U.S.C. § 3903(a)(2). Section 4(a)(3) preempts only those state laws which prohibit purchasing groups from purchasing insurance which reflects such advantages. Neither section purports to exempt purchasing group insurers from being licensed or otherwise authorized in the state where a purchasing group member resides. While it may be correct to say that preemption of Florida's licensing law would enhance the ability of purchasing groups to operate, there is not one section in the

limited list of preempted laws that explicitly preempts a state's licensing laws as they apply to purchasing groups. There is little doubt that a nondomiciliary state's licensing laws, if applicable to purchasing group insurers, would burden the ability of insurers to offer purchasing groups advantages based on their loss and expense experience. Indeed, the same could be said of many other types of insurance regulations. Congress did not include within its list of preempted laws, however, a section prohibiting laws and regulations which burden the ability of purchasing groups to operate. Congress clearly could have provided for such preemption. Instead, Congress chose to specifically preempt a limited number of state laws affecting purchasing groups, when it simultaneously and in the same Act preempted in broad terms all but a limited number of state laws affecting risk retention groups. Given Congress's choice, this court cannot accept the interpretation defendants ask the court to adopt.

Section 4(f) does not convince the court otherwise. Section 4(f) provides that a purchasing group may not purchase from an insurer not admitted to the state in which the purchasing group is located. It does not provide, as defendants suggest, that a nondomiciliary state is prohibited from requiring an insurer to comply with its licensing requirements before insuring a risk located in that state. Again, the court declines to read into a statute that was carefully crafted, a prohibition that was not clearly and explicitly included by Congress.

To support their position, defendants call the court's attention to an excerpt from the *Liability Risk Retention Act of 1986: Implementation Report* prepared by the United States Department of Commerce in September of 1987.

Although the Department of Commerce is not charged with administering the Act, Congress mandated the preparation of this report to address the implementation of the Liability Risk Retention Act of 1986. With respect to purchasing groups, the Secretary of Commerce concluded that "the Act is not working as well as intended and that some modification of the Act is necessary if it is to serve its purposes more effectively." *Report* at ES-6. More specifically, the Secretary stated that:

> [t]he basic problem regarding purchasing groups is whether purchasing groups and their insurers are subject to multi-state or single state regulation. The Act is unclear on this issue and the states have differed in their interpretation with some states concluding that every state in which a purchasing group has members has regulatory authority while others believe that such authority lies solely with the state in which the purchasing group is domiciled or has its principal place of business.

Report at ES-3. While recognizing, on the one hand, that state regulators are justifiably concerned that they lack sufficient information about purchasing group insurers to be able to prevent financial and other commercial abuses, the Secretary was concerned, on the other hand, that imposition of multiple states' regulatory requirements would be burdensome to the point of making it virtually impossible for purchasing groups to operate. Cognizant of the dilemma, the Secretary recommended solutions which would reduce regulatory burdens on the insurers of purchasing groups and, at the same time, increase the ability of state regulators to protect the public from unsound financial practices and commercial abuses. In

essence, the Secretary recommended that purchasing groups be treated more like risk retention groups.

Defendants want the court to take judicial notice of the report prepared by the Department of Commerce. They state:

> The report analyzes the language, purpose and legislative history of 15 U.S.C.A. § 3903, concludes that the Act preempts state laws such as that relied upon by the Florida Department here, and concludes further that the congressional purpose will be defeated if such laws are enforced. The Department of Commerce analysis is correct and should be followed.

See document 21, pp. 2-3. While the court agrees that the report suggests that congressional purpose will be defeated if multiple states' licensing and regulatory laws are enforced, the court cannot agree that the report states that the Act, as written, actually preempts state laws such as that relied upon by the Florida Department here. Further, even if the court could so agree, the interpretation of the Department of Commerce – an agency charged *not* with the administration or implementation of the Act but with *reporting* on how the Act was being implemented by the states – would not be entitled to deference. *See Swanco*, 879 F.2d at 358 (where the Commerce Department is not charged with administering the Act, but merely has responsibility under the Act to report on its implementation, deference is not warranted). Eleventh Circuit law does not hold to the contrary. Thus, while the report may provide valuable information and insight concerning the Act, it does not convince this court that the statute preempts the Florida licensing statutes at issue in this case.

The court is aware of only two circuit courts that have addressed the same or a related issue concerning the Act. Both cases support this court's refusal to broadly construe the preemptions contained in section 4 of the Act. In *Swanco Insurance Company – Arizona v. Hager*, 879 F.2d 353 (8th Cir. 1989), when faced with the question of whether the state of Iowa could impose its licensing requirements upon an Arizona insurance company providing coverage to a purchasing group domiciled in Arizona but having members in Iowa, the Eighth Circuit concluded that both the language and the structure of the Act supported the position that neither section 4(f) nor any other section of the Act preempts a nondomiciliary state from imposing its licensing requirements upon insurers who wish to sell to purchasing group members in that state. In *Insurance Company of the State of Pennsylvania v. Corcoran*, 850 F.2d 88 (2d Cir. 1988), the Second Circuit considered the somewhat different but related question of whether the express preemption provisions of section 4(a) could be broadly construed to prohibit a state from applying its policy-form and rate regulations to purchasing groups. An analysis of the legislative history and the structure of the Act – including, and especially, the differing schemes provided for risk retention and purchasing groups – led the court to conclude that only those state laws and regulations clearly and explicitly designated in section 4 are preempted. Both cases thus support the conclusion that Florida's licensing laws are not preempted because such laws are not included in the *specific* state laws exempted under the Act.

CONCLUSION

Having considered the record before it, and for the reasons discussed above, the court has determined that (1) the Liability Risk Retention Act does not preempt the state licensing laws that are at issue in this case, and (2) plaintiff is entitled to a permanent injunction, enjoining defendants from further violations of such laws. Although it is premature to rule on plaintiff's claims for civil penalties, the court finds that there is no just reason for delay of final judgment as to plaintiff's claims for declaratory and injunctive relief. Accordingly, it is ORDERED:

1. It is DECLARED that sections 627.949, 624.401(1), 627.918, and 626.901(1) of the Florida Statutes are not preempted by the Product Liability Risk Retention Act of 1981, as amended by the Liability Risk Retention Act of 1986, 15 U.S.C. §§ 3901-3906.

2. Defendants are hereby PERMANENTLY ENJOINED from soliciting or transacting, or aiding the transaction of, the business of insurance in Florida in violation of the above statutes.

3. Pursuant to Rule 54(b) of the Federal Rules of Civil Procedure, the Clerk of the Court shall enter final judgment accordingly.

4. This court shall retain jurisdiction over this case with respect to all remaining issues, claims and relief.

DONE AND ORDERED this 5th day of October 1989.

/s/ William Stafford
WILLIAM STAFFORD
CHIEF JUDGE